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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 13, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992--Tier Buy Through Prohibitions
MM Docket No. 92-262

Dear Ms. Searcy:

Please find enclosed on behalf of the National Association of Telecommunications Officers and Advisors, et. al., an original and 11 copies of Comments of the National Association of Telecommunications Officers and Advisors, et. al. filed in MM Docket No. 92-262.

Any questions regarding the submission should be referred to the undersigned.

Sincerely,



Bruce A. Henoch

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Tier Buy-through Prohibitions

MM Docket No. 92-262

TO: The Commission

COMMENTS OF THE
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, THE NATIONAL
LEAGUE OF CITIES, THE UNITED STATES
CONFERENCE OF MAYORS, AND THE NATIONAL
ASSOCIATION OF COUNTIES

The National Association of Telecommunications
Officers and Advisors, the National League of Cities,
the United States Conference of Mayors, and the National
Association of Counties (collectively, the "Local
Governments") submit these comments in the above-
captioned proceeding.

I. INTRODUCTION

In this Notice of Proposed Rule Making ("NPRM"),
the FCC seeks comments on implementation of
Section 623(b)(8) of the Communications Act of 1934, as
amended by Section 3(a) of the Cable Television Consumer
Protection and Competition Act of 1992 ("1992 Act").

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This section prohibits a cable television operator from requiring a customer to subscribe to any tier of service, other than the basic tier, in order to obtain video programming offered on a per channel or per program basis. In addition, the provision prohibits operators from discriminating between customers who subscribe to only the basic tier and those who subscribe to other services with regard to the rates the operator charges for programming offered on a per channel or per program basis.

The buy through prohibition, embodied in Section 623(b)(8), reflects a clear policy favoring consumer choice and provides for a limited range of exceptions only in those circumstances where a cable system's technological limitations render it unable to comply with the prohibition. The availability of an exception is disallowed after (i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitations or (ii) ten years, whichever occurs first. Finally, only in the extremely limited circumstances -- and, presumably, only during the first ten year period after enactment of the 1992 Act -- the section gives the Commission the authority to grant waivers if it determines that

compliance with the provision would require the operator to raise its rates.

Local Governments believe that the buy through prohibition is a crucial component of the 1992 Act. It fosters the public interest by favoring consumer choice and prohibiting discrimination against subscribers who make different choices. The Local Governments believe that the conditions pursuant to which a cable operator may be excepted from the buy through prohibition or, in extremely limited circumstances, be granted a waiver, should be narrowly drawn, since technology is already in place or exists that would allow most cable systems to comply with the buy through prohibition mandated by the 1992 Act. Further, a cable operator whose system falls within the technological exception contained in sub-section 623(b)(8)(B) should be required to comply with the buy through prohibition contained in Section 3(b)(8)(A) whenever the system undergoes modification or upgrade, or when the system is constructed.

The Local Governments believe that the buy through prohibition should apply automatically to all cable systems. In order for a cable operator to avail itself of the exception contained in sub-section 623(b)(8)(B), the operator should be required to submit

a written petition to the local franchising authority. The petitioner must provide a sufficient level of detail to allow the local franchising authority to determine whether the system can comply with the provisions of Section 623(8)(B)(A). If the franchising authority finds that the cable operator can offer programming on a per channel or per program basis to basic service subscribers, then the cable operator should be required to do so unless and until the franchising authority's decision is reversed by the Commission. The Commission should review only those appeals that implicate national considerations or matters requiring Commission expertise or indicate a system or pattern of abuse.

By requiring a cable operator to comply with the buy through prohibition, or in the alternative, to bear the responsibility of showing that technological limitations do not permit it to offer programming on a per channel or per program basis, the Commission will, in the most effective way, satisfy the Congressional objectives of fostering consumer choice and prohibiting discrimination among subscribers. In addition, by allowing the local franchising authority to determine, as an initial matter, whether the cable operator can comply with Section 623(b)(8)(A), the burden on the

Commission of administrating the buy through prohibition will be significantly reduced.

No exception should be available to any systems in which initial construction is commenced after the effective date of the 1992 Act, and, of course, any exception obtained by a cable operator should not be a blanket exemption to the buy through prohibition. The maximum period of time the cable operator may receive the benefit of an exception is up to and until the date that is ten years after the enactment of the 1992 Act. However, the duration of the exception must be shortened in the event the cable system is upgraded, undergoes any modification or reconstruction, or as soon as the technological limitations that provided the basis for the exception are no longer applicable.

Local governments also believe that any waivers granted by the Commission pursuant to sub-section 623(b)(8)(C) must be done on a very limited basis so as not to undercut the objectives of the 1992 Act. The waiver is an alternative to the ten year exception only to the extent that compliance with the buy through prohibition would require the cable operator to raise substantially its rates. A waiver should only be available to cable operators which are required to comply with the buy through prohibition in circumstances

where such a requirement would have a materially adverse impact on the operator's costs and profitability. The Local Governments believe such situations are rare.

The substantive standard pursuant to which the Commission may grant a waiver must be stringent. It plainly should not be sufficient for a cable operator to allege a de minimus financial impact on the cable system in question; instead the cable operator should be required to show a material adverse effect on its overall system-wide costs and profitability and, in the case of multiple system operators, such effect should be measured across all of its cable operations.

With respect to the substantive requirements of the buy through prohibition, the Local Governments concur with the Commission's interpretation that subscribers purchasing only the basic service tier are entitled to purchase premium or pay-per-view service without subscribing to any intermediate services or tiers of service (e.g., expanded basic), and that basic tier subscribers are entitled to pay the same prices for each premium or pay-per-view service as subscribers purchasing intermediate services or tiers.

II. DISCUSSION

A. The Commission Should Apply the Buy-Through Prohibition Broadly

The purpose of the buy through prohibition is to ensure that a cable subscriber is not required to subscribe to services or service tiers that it does not desire, and does not wish to pay for, in order to obtain the programming that it wants to purchase. As the Commission noted in the NPRM, the goal of the 1992 Act's buy through prohibition is to foster the ability of subscribers to choose freely among available programming services. This purpose cannot be effected if the majority of cable operators are granted wholesale exceptions or waivers from the prohibition. Thus, the Commission's rules must make the prohibition contained in Section 3(b)(8)(A) applicable to as broad a range of cable systems as possible.

The conditions under which either an exception or waiver is granted should be narrowly drawn so as to apply only to a cable operator whose system is truly incapable of complying without major or costly modifications. In other words, in waiver proceedings, the Commission should very carefully consider the financial impact on the operator's overall costs and profitability and should reject waivers where only a

modest increase in its rates may be warranted to comply with the buy through prohibition.

Providing a blanket exemption from the prohibition for any system that lacks complete addressability would effectively gut the buy through prohibition since, as the Commission noted in the NPRM, only one quarter of all cable systems are addressable. The technology currently exists that would allow most cable systems to comply with the provision at a reasonable cost.¹ The rules, therefore, should reflect a presumption that virtually all systems are capable of complying with the statute, and should require a cable operator to make an initial showing to the local franchising authority that it is not capable of complying with sub-section 623(b)(8)(A) in order to avail itself of an exception. If an operator is capable of complying with the buy through prohibition in sub-section 623(b)(8)(A) at a reasonable cost, it should be required to do so.

¹ For example, cable operators that utilize a "negative trap" system could use a mid-band trap to block out the mid-band channel frequencies, at which the cable operator could locate any intermediate or expanded tier of service. While this might require some channel realignment, this would allow the operator to offer the basic channels on the lower level channels and per channel premium programming on the upper channel spectrum without the customer having to purchase an intermediate tier of service.

The granting of an exception should be an interim solution for systems that lack the necessary technology as of the effective date of the 1992 Act, not a permanent safe harbor. Whenever the cable system is subsequently modified or upgraded, the Local Governments believe that the system must be modified so as to comply fully with the buy through prohibition.

Cable operators should not be permitted to build, or allowed to maintain, obsolete systems that are incapable of complying with the statute when the technology that would allow the system to comply is readily available at a reasonable cost.

If a cable operator is required -- for example, as a condition to renewal -- to modify its system so as to comply with the buy through prohibition -- and it asserts that such requirement will have a materially adverse effect on its overall costs and profitability, then the Local Governments urge the Commission to recognize that one of the most significant "costs" associated with complying with the buy through prohibition will be the cost of providing converters to subscribers. That cost, however, should not be considered in determining whether to grant a waiver under sub-section 623(b)(8)(C). Cable operators may provide converters to customers as necessary, but, as

the Commission has noted in its rate regulation rule making notice,² the cable operator is entitled to recover the cost of that converter from the subscriber.³ Therefore, the principal "cost" of compliance with the buy through prohibition can be passed on directly to the subscriber.

In addition, the buy through prohibition would best be implemented by requiring systems that are being modified or upgraded to comply with the provision as part of the upgrade or modification. The Commission should require a system undergoing a modification to bring itself into compliance. An operator that is upgrading its system should not continue to have the benefit of an exception when it has the opportunity to bring its system into compliance through modifications. Similarly, in those instances in which various levels of service are offered to different communities or subscribers within a single franchise area, the cable operator, subject to the franchising authority's discretion, should be required to comply in those areas where compliance is possible -- even though it may not

² Notice of Proposed Rule Making, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, FCC 92-544 (released Dec. 24, 1992).

³ Id. at ¶ 65.

have the capability of complying throughout the entire franchise area.

**B. Definition of Discrimination Between
Subscribers and Effect**

In the NPRM, the Commission interprets the buy through prohibition to mean that subscribers purchasing only the basic tier are entitled to purchase premium or pay-per-view services without subscribing to intermediate services or tiers of service (e.g., tiers commonly known as "expanded basic") and that basic tier subscribers who do so are entitled to pay the same prices for those premium or pay-per-view services as subscribers purchasing intermediate services or tiers. Local Governments concur with the Commission's interpretation of this provision.

The Commission also notes in the NPRM that, as systems achieve a higher degree of technical sophistication, services offered on "expanded basic" may be unbundled and offered on a per channel basis. Indeed, one of Congress' purposes in promulgating the buy through prohibition was to promote the unbundling of programming services.⁴ As the Senate Commerce Committee Report found, "greater unbundling of offerings leads to

⁴ Cong. Record, January 31, 1992, at S726.

more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire."⁵

While Local Governments do not anticipate that, at least in the short term, greater addressability or other technical improvements will create a structure of cable programming offerings whereby cable operators will only offer the basic service tier and all other programming services will be offered on an a la carte basis, omitting one or more expanded service tiers, Local Governments also believe that cable operators can comply with the buy through prohibition and anti-discrimination requirement by offering various multiple channels of programming, as long as cable subscribers are not required to purchase such services as a condition to purchasing other programming offered on a per channel basis. Subscribers who do not purchase such multiple channels of programming should not have to pay more in order to obtain the other programming offered on a per channel basis. Further, Local Governments believe that there may well be some cost-based benefit to subscribers in allowing operators to

⁵ Id.

provide channels on a group basis, as long as there is no discrimination against basic service subscribers. The Commission should ensure through its rules that any discounts offered are uniform to all subscribers, so that no discrimination occurs between subscribers to only the basic service tier and subscribers to other services or tiers.

It may be the case that certain cable systems will require the subscriber to utilize a converter box in order to receive the programming requested. Local Governments believe that the customer should be given as many options as possible regarding the equipment that the customer is required to pay for, commensurate with the type and level of programming that the customer wishes to receive. If the customer does receive a converter box, the cable operator should be permitted to recover the reasonable costs of the box from the customer in accordance with the other rate regulation provisions of Section 623.⁶

C. The Commission Should Adopt a Presumption That All Systems are Capable of Complying With the Prohibition.

In adopting procedures for determining whether a cable operator should be granted an exception or a waiver from the buy through prohibition, the Commission

⁶ See supra notes 2 and 3 and accompanying text.

should begin with the presumption that virtually all systems are capable of complying with the provision. First, if a cable operator believes it is not capable of complying, it should be required to petition the local franchising authority for an exception. The franchising authority, after analyzing the operator's petition and, where appropriate, the overall cost and profitability impact of compliance with Section 623(b)(8)(A), would then decide whether an exception should be granted. The cable operator should be permitted to appeal an adverse decision to the Commission, but the franchising authority's determination should be reversed only upon a finding that the franchising authority abused its discretion in denying the exception. Alternatively, the Commission could grant a waiver, if appropriate, consistent with the standards articulated above, under sub-section 623(b)(8)(C).

The cable regulatory framework underlying the 1992 Act (as well as the 1984 Act) clearly contemplates that local jurisdictions, as the governmental bodies closest to subscribers, have a primary role to play in balancing local needs, problems and expectations against cable operators' costs, facilities and equipment. The approach outlined in these comments is consistent with that policy.

Local Governments also believe that such a system for analyzing exception requests would allow a careful examination of each situation by the local authority without the Commission having to become involved with the large number of initial requests for exceptions that will undoubtedly arise under the provision.

Section 623(b)(8)(C) gives the Commission the authority to grant waivers from the buy through prohibition to operators where compliance would require the operators to raise rates. The Commission may wish to consider whether this authority should be delegated by the Commission to local franchising authorities for initial determinations, while preserving the Commission's role as final arbiter. The Commission would review applications for waivers that are denied by local franchising authorities, but should review only those appeals that implicate national policy considerations or matters requiring Commission expertise or indicate a systemic pattern of abuse.⁷

⁷ Similarly, if a local citizen or cable customer wishes to appeal a local authority's decision to allow an exception, the appeal should first be heard by the local government, and further appeals to the Commission should only be permitted under the circumstances outlined in this section.

**D. Any Small System Exemptions Should Not Apply
To Systems That Are Part of Larger Systems Or
Multiple System Operators**

The Commission seeks comment in the NPRM on how best to reduce the administrative burden and cost of compliance for cable systems that have 1,000 or fewer subscribers. Local Governments urge the Commission to ensure that any rules that are adopted with regard to this question apply only to cable systems meeting the following criteria: any stand-alone cable system (including all headends of such system) that serves a total of 1,000 or fewer subscribers in the franchise area(s) in which it provides service; except that the rules should not apply to a cable system that: (i) serves a total of more than 1,000 subscribers in multiple franchise areas, even if one or more of the franchise areas has fewer than 1,000 subscribers; and (ii) is directly or indirectly owned by a cable operator that directly or indirectly owns other cable systems, and the cable systems directly or indirectly owned by such a cable operator serve a total of 45,000 or more subscribers. This would ensure that a cable system affiliated with an MSO, because it has the resources behind it to allow it to comply with the buy through prohibition, does not receive the benefits of special

rules meant to reduce the administrative and cost burdens on small, independently-owned systems.

III. CONCLUSION

Local Governments believe that the buy through prohibition goes a long way toward ensuring that cable subscribers receive only those services they desire. The Commission's rules implementing the statute should ensure that Congress' goals are effectuated. Thus, the Local Governments urge the FCC to adopt rules with the presumption that the provision will apply to the greatest number of systems possible and that the exceptions and waiver provisions are applied very narrowly. Because the technology exists today to make this possible at a reasonable cost, the rules should recognize that it is within the capability of most cable companies to comply.

Respectfully submitted,

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